Filed 3/19/19 Hickox v. Mendonca CA5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

MARIA HICKOX et al.,

Plaintiffs and Respondents,

v.

RICARDO C. MENDONCA, Individually and as Trustee, etc. et al.,

Defendants and Appellants.

F076754

(Super. Ct. No. 16P0034)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Louis F. Bissig, Judge. (Retired Judge of the Kings Sup. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.)

McCormick, Barstow, Sheppard, Wayte & Carruth and Scott M. Reddie for Defendants and Appellants.

Dowling Aaron Incorporated, Leigh W. Burnside and Stephanie Hamilton Borchers for Plaintiffs and Respondents.

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In this probate action challenging a 2015 trust (the 2015 trust) executed by decedent Maria Mendonca (Maria), it was claimed by Maria's three oldest children, Maria Hickox (Maria H.), Carmina Harrington (Carmina) and Manuel Mendonca, Jr.

(Manuel) (together respondents) that the trust was invalid due to undue influence exerted over Maria by her fourth child, Ricardo Mendonca (Ricardo) and by her longtime companion, Ram Chander Khatree (Ram Khatree) (together appellants). Upon finding that Ricardo had *actively participated* in the preparation or execution of the 2015 trust, the provisions of which made Ricardo the primary beneficiary of Maria's estate, the trial court invoked a common law presumption of undue influence. Based solely on the effect of that presumption, the trial court declared the 2015 trust to be invalid due to undue influence. Appellants appeal, arguing the trial court erred in concluding that the active participation element of the common law presumption was established by the evidence. We believe the record adequately supported the trial court's determination that Ricardo actively participated in the preparation of the 2015 trust. Accordingly, the judgment of the trial court is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

The Mendonca Family

Maria and her husband Manuel Mendonca, Sr. immigrated to Canada from the Azores Islands of Portugal. They had three children while living in Canada: Maria H., Carmina and Manuel. In the 1970's, the Mendonca family moved to California where they had relatives working in the dairy industry. Maria and her husband leased a dairy facility and later purchased their own dairy property in Riverdale, California. The dairy became a family-run operation, and for many years the children worked alongside their parents and engaged in such daily chores as milking and feeding cattle, bottle feeding calves, and cleaning the barn and corrals.

Maria and Manuel Mendonca, Sr. had their fourth child, Ricardo, in 1986. Ricardo is nearly 20 years younger than his oldest sister, Maria H., and 10 years younger than his brother Manuel. When Ricardo was born, Maria H. was no longer living at home.

Maria H. left home at age 19 to live in the state of Washington, where she continues to reside with her husband and three children. Maria H. works in the medical field as a surgery center administrator. Carmina moved away to Canada when she was 20 years old. She later returned home for several years and continued to help with the dairy. In 1997 Carmina again moved out of state, eventually settling in the state of Washington, where she has lived for more than 20 years. Carmina is married and has two children. Her career is in special education. Both Manuel and Ricardo remained in the Central Valley. Manuel attended Fresno City College in approximately 1997 or 1998, and married Staci Mendonca. Manuel and Staci live in Lemoore, California, and have one child. Manuel entered the dairy business as a dairy reproduction specialist. As noted further below, Ricardo obtained a degree from Fresno State in 2011 and continued to live at home with his mother Maria. His siblings, who were considerably older than Ricardo, were by then married and out on their own.

Death of Manuel Mendonca, Sr./ Maria's Relationship with Ram Khatree

In 1995, Maria and her husband, Manuel Mendonca, Sr., began divorce proceedings. Shortly after those proceedings commenced, Manuel Mendonca, Sr. took his own life. At that time, Ricardo was nine years old and Manuel was 19 years old. Mr. Mendonca's death had a significant impact on the family. In addition to the emotional trauma it caused to Maria and the children, Maria was faced with running the Riverdale dairy without her spouse and partner. Approximately a year and a half later, she decided to sell her dairy cows and transitioned to running a convenience store known as the EZ Stop together with her close friend Ram Khatree.

Not long after her husband's death, Maria moved in with Ram Khatree, leaving Manuel and Ricardo living at the Riverdale dairy. Manuel took responsibility for Ricardo's care for two or three years until Ricardo later moved in with Maria and Ram Khatree. Manuel stayed behind and resided at the dairy while going to school and working.

Ricardo Remains in Maria's Home

In the ensuing years, Ricardo continued to live at home with his mother and Ram Khatree. After finishing high school, Ricardo attended Fresno State and obtained both a business degree and a real estate license in 2011. He assisted his mother and Mr. Khatree with convenience store operations. Although Ricardo tried his hand at several business ventures, he never managed to successfully run a business of his own. Ricardo's primary means of support was his mother.

The Children's Relationship with Maria

The relationship between Maria and each of her four children was found by the trial court to be close and loving. Further, as summarized by the trial court, "[t]he evidence overwhelmingly showed the family to be a loving and mutually supportive group, notwithstanding the geographical separation, age differences and occasional family squabble." According to Staci Mendonca, the only difference she noticed in Maria's relationships to the four children was that Maria sometimes tended to "baby" Ricardo.

Maria's Business Success

As noted by the trial court in its statement of decision: "Over time, [Maria] turned her focus to the convenience store/gas station business. She and [Ram] Khatree partnered to run the EZ Stop in Coalinga as well as the Jiffy Food Stop store in Easton, California. [Maria] also acquired a restaurant property in Easton that, in 2010, she operated with Ricardo under the name 'Net Grill' and purchased several other properties in the Fresno area. Ultimately, she came to own the real property on which both convenience store businesses were located and amassed a fairly valuable estate. [¶] In regard to the Riverdale dairy, [Maria] kept the property but opted to lease it out. In 2013 and 2014, she and her son Manuel discussed Manuel and his wife Staci Mendonca taking over the operation of the property, but those discussions did not bear fruit due to Manuel and

Staci's inability to obtain the requisite financing. [Maria] therefore entered into a lease with a gentleman named Sean Hodges and Mr. Hodges began operating the dairy."

Maria's Strong Personality

Maria was generally described at trial as strong willed, decisive and opinionated, especially concerning her business dealings. She often referred to herself as "the boss." Michael Karby, an attorney who knew Maria for several decades and drafted a will for her in 2012, stated: "No one ever told Maria what to do or directed her to do it. She was a force of nature." Another attorney, Richard Altimus, who had handled approximately 30 different legal matters for Maria since 1988, said that Maria never had a problem making decisions, and his observation was that "Maria told people what to do, other people didn't tell Maria what to do." Richard Atlimus's wife and coworker, Fawn Altimus, who had known Maria for over 20 years, described Maria as "feisty," "decisive," "direct when she told you something," "independent thinking," and "strong willed." Based on her interactions with Maria, Fawn Altimus did not think that Maria was someone who could be easily influenced or manipulated by others.

At the same time, Manuel testified that his mother was not particularly strong willed when it came to Ricardo, and Manuel mentioned as an example the occasion that his mother did not want Ricardo to be told that she was offering (in 2013) to allow Manuel to purchase the dairy business because Ricardo would "put an end to it" if he found out.[1] Additionally, there was considerable testimony to the effect that after Maria's cancer diagnosis and surgery in 2015, which we will summarize presently below, Maria was not herself, but was weak and exhausted, unable to interact as before. Carmina believed that after the cancer diagnosis and surgery in 2015, her mother's "fight was not there any longer," she was no longer feisty, and "her strong will was gone."

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[1] The purchase of the dairy business was never made because Manuel and his wife Staci decided they could not afford it.

The 2012 Will

In March 2012, Maria decided to make a will and placed a phone call to Dinuba attorney Michael Karby, whom she had known for many years. Attorney Karby testified that Maria told him she needed a will prepared right away and asked that he meet her at the EZ Stop store in Coalinga. When he arrived at the store, she told him that her will must provide that the Riverdale dairy was to be sold and the proceeds divided equally between her four children, and the balance of her estate would go to Ram Khatree. Ram Khatree was also there and requested that the attorney prepare a will for him to leave most of his estate to Maria. Attorney Karby prepared the requested wills, returned later that afternoon, and he and a friend witnessed the execution of both wills.

Although she never disclosed the existence of her 2012 will to any of her four children, Maria told Carmina and Manuel on several occasions over the years that the Riverdale dairy property was for "you kids." Manuel's wife, Staci, overheard Maria make similar comments and stated that it was known in the family that the diary would ultimately be shared by Maria's four children. Maria never made any comments to the contrary.

Maria's 2014 Estate Planning

The individual who rented the Riverdale dairy, Sean Hodges, filed a lawsuit against Maria, her son Manuel and Ram Khatree for alleged breach of contract and fraud. Attorney Michael Karby initially handled the defense of the lawsuit. The lawsuit was upsetting to Maria and very hard on her.

While the lawsuit was being defended, Maria decided to meet with a colleague at Karby's law firm, namely attorney David Hogue, to discuss her estate plan. Maria met with attorney Hogue in the fall of 2014 and again in December of 2014. Based on those discussions, attorney Hogue prepared an estate plan for Maria that included drafting a trust, a pour-over will, a durable power of attorney, and an advance health care directive. The draft trust, which was based on Maria's specific instructions, provided as follows:

Carmina was to receive three real properties in Easton, California, and she was also to receive the contents of Maria's home at 6289 S. Clara Street after the death of Ram Khatree; Ricardo would receive the Jiffy Food store in Easton and the EZ Stop store in Coalinga, both of which were to be subject to a life estate in favor of Ram Khatree; Ricardo would also receive Maria's home, again subject to a life estate for Ram Khatree. The entire balance of Maria's estate, including the Riverdale dairy, was to be distributed equally among Maria's four children. The draft trust did not require the sale of the Riverdale dairy but instead preserved the asset for the four siblings. At a later meeting with attorney Hogue on December 16, 2014, Maria added pecuniary bequests of $100,000 each to Maria H. and Manuel, but everything else remained the same.

In the course of her discussions with attorney Hogue, Maria made it clear that she did not want her estate planning matters shared with any members of her family. On December 11, 2014, she spoke by telephone with a member of Mr. Hogue's staff and reminded her that "NO ONE" in her family was to be made aware of the details of the estate plan. During that time frame, Ricardo would occasionally visit the law office to help Maria with certain clerical tasks concerning the defense of the Hodges lawsuit. Plainly, Maria wanted to make sure her estate planning wishes were not disclosed to Ricardo or his siblings.

Ultimately, Maria did not sign the draft trust instrument prepared by attorney Hogue. She told his staff that she was having a "bad luck year" and that she wanted to wait until 2015 to sign the draft trust. Although Maria did not sign the 2014 trust document, several months later she told Carmina that her sister Maria H. was going to inherit $100,000, and she also told Manuel that his daughter would not have to worry about finances.

Maria's Cancer Diagnosis

In February 2015, following her return to California after visiting Carmina in Washington, Maria began bleeding vaginally. In mid-March, the bleeding became

profuse and Maria was taken to the hospital. Manuel's wife Staci, a "surgical tech" employed at Valley Children's Hospital, was extremely concerned and made an appointment for Maria to see a doctor whom Staci knew, Dr. Richard Ellsworth, at his practice the following morning. At that examination, which Staci attended, Dr. Ellsworth found that Maria had a large mass in her abdomen and other unusual growths on her cervix. At one point in the examination, Dr. Ellsworth looked over at Staci and said, "This is bad." Following the examination, Maria continued bleeding and began vomiting in Dr. Ellsworth's office. Dr. Ellsworth recommended that Maria be taken to a University of California facility, but said she was bleeding so badly she might not make it there. He therefore suggested she be seen right away by a surgeon, Dr. Rich, at Fresno Community Hospital.

On March 17, 2015, Maria was admitted to Fresno Community Hospital and had emergency surgery the following day. Her surgeon, Dr. Rich, was unable to remove the tumor. Maria's cancer was advanced, and the tumor was inoperable. A few days later, Maria was discharged and returned home. She was still bleeding vaginally.

Carmina traveled from Washington and arrived in Fresno before Maria's surgery. Carmina stayed for approximately six weeks and took care of her mother, who needed round-the-clock assistance. Maria was set up in a bed in the living room of her home. She had a large incision wound and needed assistance with such tasks as getting in and out of bed, toileting, dressing, walking, bathing and taking medications. Carmina helped Maria with these daily tasks, and also cooked, cleaned and did laundry. Carmina paid special attention to the preparation of Maria's meals, avoiding processed foods and sugar and attempting to provide a healthy diet for Maria that would help her battle the cancer. However, Maria often did not like the taste of the food and insisted on eating things like cornflakes. On one occasion, when Carmina refused to give her mother cornflakes to eat, the two of them quarreled about it. Later, when Carmina asked her mother if they were "still friends" and Maria said "sure," Ricardo became extremely angry and, in front of

Maria, yelled loudly at Carmina that "Mom is not your friend. She is your mother." Maria did not say a word in response. As the trial court put it, "[c]owed, [Maria] stayed silent."

During the six weeks that Carmina stayed and cared for her mother, Maria did very little other than sleep and watch television during the day. Her energy level was very low. Manuel testified that Maria's condition during this period seemed "horrible," that she was so tired she could not interact with her family or even talk on the phone for more than a couple of minutes. When Maria's bleeding would not stop, she was hospitalized on April 16, 2015, at U.C. Irvine and underwent multiple blood transfusions. Her family had been told by doctors that if she were not admitted to the hospital, she likely would die due to the excessive blood loss; that is, she was bleeding to death.

Maria's Appointment With Attorney Richard Altimus

On April 7, 2015, during the time that Carmina was taking care of Maria, Carmina went out of the house for a little while and left Maria in Ricardo's care. Ricardo believed Carmina may have gone to the house his mother owned next door. Once Carmina was out of the house, Ricardo placed a call to the law office of attorney Richard Altimus in Hanford, California. Although Maria had worked with attorney Altimus several times in the past and, according to Ricardo, could have dialed the number herself, Ricardo testified that his mother asked him to dial the attorney's phone number, which he did and then handed her the phone. With Ricardo beside her, Maria expressed to Mrs. Altimus that she needed to have a will prepared and was scheduled to start chemotherapy on April 14, 2015. Maria requested that Richard Altimus call Ricardo back. Either Mr. or Mrs. Altimus later called Ricardo and left a message with a proposed appointment on April 13, 2015. Ricardo returned the call and confirmed the appointment. Ricardo did not mention the phone call or the April 13th appointment to Carmina, even though Carmina was still taking care of Maria.

On April 13, 2015, three days before Maria was hospitalized at U.C. Irvine for severe bleeding, Ricardo told Carmina that he was taking Maria "for a drive." Ricardo then drove his mother from her home in Easton to Hanford to meet with attorney Richard Altimus. Maria was in a wheelchair, and Ricardo pushed her in the wheelchair into Richard Altimus's office. Richard Altimus, Fawn Altimus, Maria and Ricardo met together in Richard Altimus's interior office to discuss Maria's estate planning intentions. Fawn Altimus took notes. With Ricardo sitting beside her, Maria told Richard Altimus that she wanted to make only small cash bequests to her three oldest children. Maria offered no explanation for this decision. Maria did not disclose the existence of her 2012 will, nor did she tell Mr. Altimus that, only four months prior, she had retained and met with attorney Hogue to prepare a comprehensive estate plan that would have generously provided for all her children. In addition to mentioning the small cash gifts to her three oldest children, Maria also stated she wanted to leave Ram Khatree a life estate in two of her properties. The balance of Maria's estate was to go to Ricardo, who was also to be a cotrustee. Further, Maria told Mr. Altimus that she wanted all original documents to be kept at his office; she did not want any documents at her home. During the meeting, Ricardo remained quiet; he did not say anything about the trust.

Following this discussion, Richard Altimus excused Fawn Altimus and Ricardo from his office and met privately with Maria for a short time. Richard Altimus testified that during this private meeting with Maria, he attempted to convince her to do more for her oldest children, which would minimize the possibility of a contest, but she refused and told Mr. Altimus she had made up her mind. Again, however, Maria offered no explanation for the disparate treatment of her children. According to Richard Altimus's testimony, it appeared to him that Maria knew exactly what she was doing. Although Maria was weak physically, he testified that "her mind was working just as always, just as sharp as she always is." There was nothing Richard Altimus observed that led him to believe Maria was being influenced or pressured to do something she did not want to do.

Before Ricardo left the office with Maria, he wrote a check to attorney Altimus for $2,500, which Maria signed. Ricardo never mentioned the appointment to Carmina or to Ram Khatree. Ricardo testified that Maria told him about the provisions of her estate plan during the drive home, including what his siblings and Ram Khatree would receive, but he said he did not recall Maria informing him (Ricardo) of what he would receive.

Ricardo's Assistance Regarding the 2015 Trust

According to Richard Altimus, Maria had requested that Ricardo help gather information such as real property deeds. The next day Ricardo e-mailed to Richard Altimus's law office copies of a number of grant deeds for real properties owned by Maria. In the same e-mail, Ricardo asked attorney Altimus, "Would you please advise *me* of how [Maria] can include her properties in Azores into the will or trust?" (Italics added.) There had been no mention of the Azores properties in Fawn Altimus's notes of the April 13th meeting, and no one from Mr. Altimus's office contacted Maria after receipt of Ricardo's e-mail to confirm whether this was in fact what she wanted to do. On the other hand, Richard Altimus's recollection was that he thought he had talked to Maria about the Azores property at their one-on-one private meeting on April 13, 2015, and also on May 7, 2015 when she signed the documents. He said that he did not need to confirm her desire to include the Azores property in the 2015 trust because he knew that she definitely wanted it included.

Ricardo also provided to Richard Altimus two handwritten "balance sheets" prepared by Ricardo listing Maria's assets and liabilities, which documents were presumably provided to Richard Altimus to further assist him with drafting the estate plan. Ricardo gave conflicting testimony about when he had prepared the balance sheets. In his deposition, he stated he prepared them sometime after the April 13, 2015 meeting, but then at trial he testified that he had prepared the balance sheets with his mother at or around the dates listed on them—i.e., March 19, 2015, and March 31, 2015. However, as the trial court observed, on March 19, 2015, Maria was still hospitalized at Fresno

Community Hospital and had just undergone major surgery the day before to try and remove the tumors on her uterus. The March 19, 2015 balance sheet prepared by Ricardo expressed several goals, one of which was to amass $34 million by 2044.

According to the trial court's statement of decision, "[a]rmed with the deeds received from Ricardo, Ricardo's request to include the Azores properties in the trust, Ricardo's handwritten balance sheets, and her notes of the April 13, 2015 meeting, Fawn Altimus prepared a draft trust instrument [and other documents] which she then gave to Mr. Altimus to review." None of the draft documents, which included a draft trust, a pour-over will, a durable power of attorney for health care and a durable power of attorney for assets, were sent to Maria to review.

Maria Signs the 2015 Trust

On May 7, 2015, Ricardo drove Maria back to attorney Richard Altimus's office to execute the 2015 trust and other documents. Maria did not feel well and did not want to get out of the car, and Ricardo made this known to Richard and Fawn Altimus. To accommodate Maria, Richard and Fawn Altimus took all the testamentary documents out to Maria in the car. Richard Altimus testified that Maria looked weak but still seemed alert. She appeared to know what was going on and she knew "we were doing what she told us to."

Maria executed the 2015 trust and other documents while sitting in the passenger seat of the car, in the parking lot outside of the law office. It took approximately one hour to sign all the documents. To accomplish this, Fawn Altimus squatted down next to Maria and had her execute the 2015 trust, a pour-over will, durable powers of attorney, deeds and other documents, one at a time. Richard Altimus did not personally review the documents with Maria and Maria did not read them herself, but Fawn Altimus read key portions of the documents out loud while Richard Altimus was present to answer questions and confirm Maria understood what was read. When Fawn Altimus read to Maria the selected portions of each document, including each of the dispositive

provisions, Richard Altimus would say, "Is that right? Is that what you wanted? Do you understand that?" and Maria responded in the affirmative. According to Fawn Altimus, at no time during that signing process did Maria balk or hesitate or indicate that any provision was not what she wanted. Rather, Maria confirmed to Richard and Fawn Altimus that this was what she wanted. Likewise, according to Richard Altimus, it was clear that the trust documents reflected Maria's wishes and she knew exactly what she was signing.

During the entire meeting in the parking lot, Ricardo sat beside his mother in the front seat of the car with only the center console between them. However, Ricardo previously testified at his deposition that he was not present when Maria signed the 2015 trust and other documents. His testimony at his deposition was that Maria had executed the documents in Mr. Altimus's interior office while he remained outside in the reception area and that he did not know what was explained to Maria when she was signing the documents because he was not there. At trial, however, after Richard and Fawn Altimus testified that the documents were signed in the front seat of the car and that Ricardo was sitting in the car next to Maria the whole time, Ricardo changed his prior account of what happened. Ricardo was questioned about this on the stand at trial:

"Q: It's only after you heard Mr. and Mrs. Altimus testify that you did remember how that appointment had taken place?

"A: I would say.

"Q: Okay. You didn't remember that your mother had sat in a parking lot for close to an hour signing documents?

"A: I forgot.

"Q: You didn't remember that you were sitting in the driver's seat next to her, for nearly an hour, while she signed estate planning documents?

"A: I'm sorry, I was mistaken. I'm sorry, I forgot.

"Q: You didn't recall that you, yourself signed the trust in the front seat of the car?

"A: I forgot where I was."

Maria signed the 2015 trust and other estate planning documents as they were presented to her. She did not read or review them at the time, and in fact one of the documents indicated the wrong person as trustee, which went unnoticed. While the documents were being signed, Ricardo sat there in the car and remained quiet. Following the execution of the documents, Ricardo drove Maria back home to Easton. He never mentioned the appointment to his siblings or to Ram Khatree. All of the original executed documents stayed at attorney Richard Altimus's office.

Maria's Further Deterioration and Death

In the months following the appointment with Mr. Altimus on May 7, 2015, Maria's health continued to deteriorate. She continued to receive chemotherapy and radiation treatments at U.C. Irvine, but the disease continued to progress. Carmina and Maria H., who were both in Washington, tried during this time period to get updates from Ricardo or from Ram Khatree regarding Maria's treatment and status. They called frequently, but no one answered; they left messages, but no one called back. Carmina was able to get through to Ricardo on one occasion, and when she asked to be kept informed of how their mother was doing, Ricardo responded by yelling, "[t]his is Mom's fight" as though Maria's condition was none of Carmina's business. Ricardo admitted at trial that he did not contact his sisters about Maria's condition, but stated that he assumed Manuel would do so.

Maria H. testified that prior to her mother's surgery in March, she had a good phone conversation with her, but a few days later when Maria H. flew down to California to see her mother in the hospital, she was told that her mother did not want to see her. According to Manuel and Carmina, their mother was apparently upset at Maria H. for allegedly taking family photographs and for leaving home as a teenager some 30 years

prior. When Maria H. later visited her mother in October 2015, Maria asked her, "Where have you been?" Maria H. answered that she had come in March, but Maria apparently did not want to see her. During a later visit, Maria H. was told by her mother that "[t]hey wouldn't let me talk to you." Maria H. understood her mother to be referring to Ricardo and Mr. Khatree.

Maria's condition continued to get worse and she was admitted to the hospital at U.C. Irvine in November 2015. She died on November 17, 2015, in the presence of her four children and Ram Khatree. The following month, Maria's three oldest children received a copy of the 2015 trust from Richard Altimus.

Procedural History

On April 8, 2016, Maria H., Carmina and Manuel filed their petition to determine validity of the 2015 trust. The petition alleged that the 2015 trust was invalid and should be set aside because it was executed as a result of undue influence exerted by Ricardo and Ram Khatree. A seven-day court trial was conducted in March of 2017, after which the parties submitted extensive posttrial briefing.

The trial court's statement of decision was filed on September 8, 2017. In its statement of decision, the trial court concluded that a common law presumption of undue influence was applicable in this case because (i) there was a confidential relationship between Maria and Ricardo, (ii) Ricardo actively participated in the actual preparation or execution of the 2015 trust, and (iii) Ricardo would unduly benefit from the 2015 trust. The trial court found the active participation element was met based on a number of circumstances, including among other things Ricardo's involvement in supplying the attorney with real property deeds and balance sheets and ensuring the inclusion of the Azores property in the trust; Ricardo's involvement in getting Maria to the attorney in secrecy and haste, even while Maria was very ill; Maria's inability to speak privately with Mr. Altimus when the documents were signed on May 7, 2015 due to Ricardo's

constant presence in the car; and Ricardo's contradictory, false and evasive testimony relating to his actual involvement.

The trial court further held that defendants did not rebut the presumption, and accordingly, the court declared that the 2015 trust documents were the product of undue influence. As a result, based solely on the effect of the presumption, the trial court specifically found "the entire May 7, 2015 Trust documents to be invalid on the ground they were the result of undue influence by [defendant] Ricardo C. Mendonca."

Defendants' notice of appeal followed.

DISCUSSION

I. Standard of Review

It is for the trier of fact to determine whether the common law presumption of undue influence applies and whether the burden of rebutting it has been satisfied in a given case. (*Estate of Sarabia* (1990) 221 Cal.App.3d 599, 605.) In determining on appeal whether there is sufficient evidence to support one or more elements of the presumption of undue influence, we apply the substantial evidence standard of review. (*Estate of Auen* (1994) 30 Cal.App.4th 300, 311.) Under that standard, we defer to the trier of fact on issues of credibility, and all factual matters are viewed most favorably to the prevailing parties, with any conflicts in the evidence resolved in their favor and in support of the judgment. Our power begins and ends with a determination of whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the trier of fact. (*Estate of Auen, supra*, 30 Cal.App.4th at p. 311; *Nestle v. City of Santa Monica* (1972) 6 Cal.3d 920, 925–926; *Estate of Evans* (1969) 274 Cal.App.2d 203, 211.)

II. Overview of Common Law Presumption

"As a general proposition, California law allows a testator to dispose of property as he or she sees fit without regard to whether the dispositions specified are appropriate or fair." (*Estate of Sarabia*, *supra*, 221 Cal.App.3d at p. 604.) " ' "[I]f there be no defect

of testamentary capacity, and no undue influence or fraud, the law gives effect to [the testator's] will, though its provisions are unreasonable and unjust." ' " (*Kelly v. McCarthy* (1936) 6 Cal.2d 347, 352.)

"Undue influence is pressure brought to bear directly on the testamentary act, sufficient to overcome the testator's free will, amounting in effect to coercion destroying the testator's free agency." (*Rice v. Clark* (2002) 28 Cal.4th 89, 96.) Normally, the party contesting a testamentary document on the ground of undue influence bears the burden of proof on that issue. (Prob. Code, § 8252, subd. (a).) However, the courts of this state have held that a presumption of undue influence, shifting the burden of proof, arises where the following three elements have been established: (1) the person alleged to have exerted undue influence had a confidential relationship with the testator; (2) the person actively participated in procuring the instrument's preparation or execution; and (3) the person would benefit unduly by the testamentary instrument. (*Rice v. Clark*, *supra*, 28 Cal.4th at pp. 96–97; *Conservatorship of Davidson* (2003) 113 Cal.App.4th 1035, 1059–1060; *Estate of Sarabia*, *supra*, 221 Cal.App.3d at p. 605.)

"If this presumption is activated, it shifts to the proponent of the [testamentary document] the burden of producing proof by a preponderance of evidence that the [document] was not procured by undue influence." (*Estate of Sarabia*, *supra*, 221 Cal.App.3d at p. 605.) It is for the trier of fact to determine whether the presumption will apply, and if it is found to apply, whether the burden of rebutting it has been satisfied. (*Conservatorship of Davidson*, *supra*, 113 Cal.App.4th at p. 1060.)

III. The Active Participation Element

In the present appeal concerning the applicability of the common law presumption, appellants have not challenged the trial court's finding of fact that Ricardo and Maria were in a confidential relationship, nor have they challenged the trial court's finding of fact that Ricardo would unduly benefit from the 2015 trust. Accordingly, these issues are forfeited on appeal. (*In re Marriage of Sheldon* (1981) 124 Cal.App.3d 371, 381

[appellate court may consider as waived or forfeited any issues not raised in the appellant's opening brief].) Instead, appellants' appeal has only raised the issue of whether there was sufficient evidence presented for the trial court to find the active participation element was established. Before resolving that precise question, we shall first undertake a careful review of the case law regarding the active participation element.

Preliminarily, we recognize that in most cases where undue influence is being adjudicated, direct evidence is not available and trial courts must make their findings based on circumstantial evidence and inferences drawn therefrom. (*Estate of Evans*, *supra*, 274 Cal.App.2d at p. 212.) Thus, a beneficiary's active participation in the preparation or execution of a testamentary document may be shown by circumstantial evidence and reasonable inferences. (*Estate of Garibaldi* (1961) 57 Cal.2d 108, 113 ["Activity on the part of proponents in procuring the execution of the will may be established by inference, that is, by circumstantial evidence."]; *Estate of Gagliasso* (1957) 150 Cal.App.2d 65, 69.) In the absence of substantial evidence—circumstantial or otherwise—to support the active participation element, the presumption cannot apply because all three elements must be shown (*Conservatorship of Davidson*, *supra*, 113 Cal.App.4th at pp. 1059–1060) and because, in that case, there would be "no causal link between the ability to influence the testator arising from the confidential relationship and the unnatural document." (*Estate of Fritschi* (1963) 60 Cal.2d 367, 374.)

What, then, must be shown to establish the active participation element? Generally, there must be activity on the part of the beneficiary in the matter of the preparation of the testamentary instrument at issue. (*Estate of Fritschi*, *supra*, 60 Cal.2d 367, 376.) Thus, " '[s]ome incidental activity in the execution, rather than the preparation of the will, is not enough to swing the burden.…' [Citation.]" (*Id.* at p. 376.) Furthermore, the cases are clear that (i) merely having the opportunity to influence the testator in procuring the will or trust is not enough, and (ii) incidental involvement or assistance is likewise insufficient to establish this element. Concerning these points, the

following quotation is fairly representative of the relevant case precedent: "The mere existence of opportunity and motive to procure is insufficient to give rise to the presumption. [Citation.] Physical presence of the beneficiary at the execution of the will is insufficient. [Citations.] Nor does the procurement of a person to witness a will or of an attorney to draw one constitute active participation. [Citations.] There must be activity on the part of a beneficiary in the matter of the actual preparation of the will. [Citation.]" (*Estate of Straisinger* (1967) 247 Cal.App.2d 574, 586; accord, *Estate of Wright* (1963) 219 Cal.App.2d 164, 169–170; *Estate of Ausseresses* (1960) 178 Cal.App.2d 487, 491; *Estate of Bould* (1955) 135 Cal.App.2d 260, 275 [the "activity must be in the preparation of the will"].) As was similarly expressed in *Estate of Sarabia*, *supra*, 221 Cal.App.3d at page 605, the active participation must be "in the *actual* preparation or execution of the will" and cannot be "of a merely incidental nature." (Italics added.)

In *Estate of Wright*, *supra*, 219 Cal.App.2d 164, where the only involvement by the beneficiary under a codicil to a will was "the transmission of decedent's written instructions to the attorney for the preparation of the codicil" and her presence at the document's execution as a passive observer, the Court of Appeal held such facts were not enough to establish the active participation element of the presumption. (*Id*. at p. 170.) After articulating the recognized standard that " ' "[t]here must be activity on the part of the beneficiary in the matter of the preparation of the [testamentary document]," ' " the court held the evidence did not support a finding that she had any part in the codicil's preparation. (*Id*. at pp. 169–170.) In so holding, the court provided the following summary from an earlier appellate court decision reaching the same conclusion under similar facts: " 'The necessary active participation cannot be inferred from the fact that the proponent accompanied the testatrix to the attorney's office [citations] or that the proponent selected the attorney [citations], or that the proponent was present at the execution of the will, … [citations] or that the proponent was present when instructions

were given as to the contents of the will,… [Citations.]' " (*Id*. at p. 170, quoting *Estate of Ausseresses*, *supra*, 178 Cal.App.2d at p. 491; accord, *Estate of Bould*, *supra*, 135 Cal.App.2d at pp. 275–276 [providing a similar summary of what does not constitute active participation].)

Similarly, in *Estate of Watkins* (1947) 81 Cal.App.2d 465, 475, the appellate court held that "the evidence fail[ed] to show that proponents actively participated in the procuring and execution of the will." (*Id.* at p. 475.) The evidence in question was that a beneficiary called the attorney in to draw the will, was present when the attorney interviewed the testator and when the will was executed, took possession of the will after its execution and paid the attorney for preparing it. (*Ibid*.) The court explained that such circumstances at most showed that the beneficiary had an opportunity to influence the testator, which was not enough. (*Id*. at pp. 475–476.)

In a more recent case, *Estate of Mann* (1986) 184 Cal.App.3d 593, the Court of Appeal addressed the issue of whether the evidence in that case supported the finding that the beneficiary under the will actively participated in procuring its execution. (*Id*. at p. 606.) After stating the applicable principles that "[t]here must be activity by the beneficiary in the actual preparation of the will," and that " '[m]ere opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient' [citations]," the court concluded the evidence was insufficient. (*Id.* at p. 607.) The court explained as follows: "While [the beneficiary] obviously had the opportunity and motive to influence decedent, the most that can be drawn from the evidence concerning his activity in procuring the will is that he urged her to make a will 'if she was so inclined,' took her to an attorney for this purpose, and was present at the execution of the will. [¶] Evidence that [the beneficiary] urged decedent to make a will is irrelevant inasmuch as there is no evidence he urged her to make any particular disposition." (*Id*. at p. 608.) In other words, there must be evidence that the beneficiary "*sought to determine the contents of the will*," or in some way "*affected the dispositive*

contents of the will." (*Ibid*., italics added.) The court held that such evidence was lacking.

In so holding, the court in *Estate of Mann* reiterated the holdings of prior cases as to the types of activities that, without more, have been deemed insufficient to satisfy the active participation element:

> " '[The] mere fact of the beneficiary procuring an attorney to prepare the will is not sufficient "activity" to bring the presumption into play …; or selection of attorney and accompanying testator to his office …; or mere presence in the attorney's outer office; … or presence at the execution of the will …; or presence during the giving of instructions for the will and at its execution …' [Citation.] The evidence is uncontradicted that appellant was not present during [the attorney's] main discussion with decedent regarding the substance of the will, and there is no evidence his presence at execution of the will was anything but that of a passive observer." (*Estate of Mann*, *supra*, 184 Cal.App.3d at p. 608.)

Again, in concluding the active participation element was not satisfied, the crux of the matter in *Estate of Mann* was the appellate court's conclusion that "there is no evidence that [the beneficiary] sought to determine the contents of the will" or "in any way affected the dispositive contents of the will." (*Estate of Mann*, *supra*, 184 Cal.App.3d at p. 608.)

To complete our overview of the law, we note the analysis used in *Estate of Swetmann* (2000) 85 Cal.App.4th 807, although the case was not determined under the common law presumption as such. In *Estate of Swetmann*, the elderly testator's neighbor and conservator (Cushing), who had for many years helped the testator and his wife, arranged for the testator to meet with an estate planning company, provided information to the estate planner regarding the testator's assets, was present when the estate planning documents were executed, and paid the estate planner from the conservatorship. (*Id.* at pp. 809–814, 820.) Although Cushing had nothing to do with the actual contents of the will or its physical preparation, he was named as residuary beneficiary. (*Id*. at pp. 809, 813–814, 821.) The appeal in *Estate of Swetmann* concerned the validity of the

testamentary disposition to Cushing under a special statutory provision—i.e., former section 21350 of the Probate Code (now § 21380)—which created a presumption of invalidity of a donative transfer in an instrument where the transfer was to a fiduciary who either transcribed the instrument or caused it to be transcribed. (*Estate of Swetmann, supra,* 85 Cal.App.4th at p. 816.) The particular issue to be resolved on appeal was whether Cushing had caused the will to be transcribed within the meaning of Probate Code section 21350. (*Estate of Swetmann,* at pp. 809, 817–818.)

After concluding based on statutory construction that Cushing did not cause the instrument to be transcribed for purposes of that statute, *Estate of Swetmann* found additional support for its conclusion by making a comparison to the active participation element of the common law presumption. (*Estate of Swetmann, supra,* 85 Cal.App.4th at pp. 820–821.) The court noted that under the case law relating to the common law presumption, the active participation element "required a showing that the beneficiary actively participated in the preparation of the will; it was not enough that the beneficiary procured an attorney to draft the will if the beneficiary did not affect the contents of the will." (*Id*. at p. 821.) In that regard, the court found that Cushing's activity in the case before it was closely analogous to *Estate of Mann, supra*, where the beneficiary was similarly involved in facilitating the procurement of a will, but it was held such activity did not affect the dispositive contents of the will. (*Estate of Swetmann,* at pp. 820–821.) The court in *Estate of Swetmann* completed its discussion analogizing the two cases as follows: "While we recognize that *Mann* involved undue influence and the elements required to affirmatively prove it, presumption and all, and that the legislation here at issue presumptively invalidates certain transfers, the aim of this legislation is the setting where the donee is in a 'unique' position to procure a gift for the donee's own gain. And just as the nephew in *Mann* did not, despite his extensive involvement with his aunt, affect the dispositive contents of the will, likewise Cushing did not cause to be transcribed any instrument involved here." (*Estate of Swetmann, supra,* 85 Cal.App.4th

at p. 821; see also, *Rice v. Clark, supra,* 28 Cal.4th 89, 97–98 [noting that in enacting Prob. Code, § 21350 et seq., the Legislature was "supplementing" the common law presumption with new protective measures].)[2]

IV. The Evidence Was Sufficient to Establish Active Participation

Based on the foregoing survey of relevant case law, we conclude that to establish the active participation element of the common law presumption of undue influence in cases such as this, it is necessary to show that there was participatory activity on the part of the beneficiary *in the matter of the actual preparation* of the will or trust at issue, and that such activity was more than of an incidental nature. (*Estate of Fritschi, supra,* 60 Cal.2d 367, 376; *Estate of Sarabia, supra,* 221 Cal.App.3d at p. 605; *Estate of Straisinger, supra,* 247 Cal.App.2d at p. 586.) More particularly, the evidence must be sufficient to permit the trial court to reasonably infer that the beneficiary's actions affected in some way (or at least attempted to affect) the contents or dispositive provisions of the testamentary document under consideration. (*Estate of Mann, supra,* 184 Cal.App.3d at p. 608.)

Here, the trial court found that Maria's primary beneficiary under the 2015 trust—namely, Ricardo—actively participated in the manner described above. Because of that finding, along with findings that the other two elements of the common law presumption were satisfied, the trial court concluded the presumption applied. The trial court declared the 2015 trust to be invalid due solely to the effect of the presumption of undue influence, which it found was unrebutted. At this point, it is important to note that the trial court *did not find* there was sufficient evidence apart from the common law presumption to prove

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2 In *Rice v. Clark, supra,* 28 Cal.4th 89, 91–92, the Supreme Court concluded, in agreement with *Estate of Swetmann*, that the term "causes [the instrument] to be transcribed" under Probate Code section 21350 is not so broad that it would include a person who merely "provides information needed in the instrument's preparation and who encourages the donor to execute it, but who does not direct or otherwise participate in the instrument's transcription to final written form."

Ricardo had exerted undue influence on Maria in connection with the 2015 trust. In other words, this case does not involve a direct finding of undue influence based on all relevant facts and circumstances (see, e.g., Prob. Code, § 86; Welf. & Inst. Code, § 15610.70). Instead, the trial court decided, much more narrowly, only that the three elements of the rebuttable presumption were established. Accordingly, our analysis of the present appeal will focus on whether the active participation element of the common law presumption was shown. If that necessary element of the presumption was not established by substantial evidence, our inquiry ends and a broader consideration of other circumstances would be unwarranted.

In the instant appeal, appellants argue that the matters relied on by the trial court to support its finding of active participation were insufficient or consisted of the same types of activities that appellate courts have consistently found to be inadequate to show active participation under the relevant law. We disagree with appellants' assessment of the evidence. Rather, as more fully explained below, we conclude there *was* substantial evidence to support the trial court's finding that Ricardo actively participated in the actual preparation of the 2015 trust.

In the trial court's analysis of the active participation element, the court appears to have concluded that Ricardo "affected the material contents" of the 2015 trust by his extensive activity to ensure both that the trust would be drafted and that *particular assets* would be included therein. This was purportedly evidenced by, among other things, Ricardo's actions of not merely getting Maria before the attorney in the manner he did (i.e., in secrecy and haste while Maria was weak from cancer and blood loss), but more importantly, of his sending to the attorney the e-mail copies of numerous real property grant deeds, the balance sheets that listed Maria's assets, and Ricardo's e-mail relating to the Azores property. Appellants counter that merely providing general information about Maria's assets does not show Ricardo had an impact on the dispositive provisions of the trust. Appellants would be correct if we first assumed for the sake of argument that their

initial premise is accurate (i.e., that Ricardo was merely providing general asset information), but as explained below, that was not the case here. We recognize that merely furnishing information to the testator's attorney concerning the testator's assets would ordinarily be in the nature of incidental help or assistance to the process that, by itself, would not constitute active participation in the actual preparation of the testamentary instrument. (*Estate of Wright*, *supra*, 219 Cal.App.2d at p. 170 ["transmission" of testator's written instructions to the attorney for preparation of codicil did not establish active procurement]; see *Estate of Mann*, *supra,* 184 Cal.App.3d at p. 608 [there must be indication that the activity could have affected how property was to be disposed of under the will].) However, as set forth below, we believe that Ricardo's e-mail regarding the Azores property went *beyond* the general provision of asset information or mere incidental involvement and instead showed his active participation in the preparation of the 2015 trust.

Ricardo's e-mail to Richard Altimus containing the grant deed information included the following specific directive to the attorney: "Would you please advise *me* of how [Maria] can include her properties in Azores into the will or trust?" (Italics added.) The fact that he, Ricardo, wanted to be personally advised regarding the trust contents provides some evidence that he was engaging in more than a passive or incidental involvement therein. In its statement of decision, the trial court found that there had been no mention of the Azores property in Fawn Altimus's notes of the April 13th meeting, and furthermore, "no one from Mr. Altimus's office contacted Mrs. Mendonca after receipt of Ricardo's e-mail to confirm whether this was in fact what she wanted to do." The trial court also specified in its statement of decision that when Fawn Altimus had prepared the draft trust documents, she did so "[a]rmed with the deeds received from Ricardo, *Ricardo's request to include the Azores properties in the trust*, Ricardo's handwritten balance sheets, and her notes of the April 13, 2015 meeting." (Italics added.) In light of these specific findings, it is reasonable to construe the trial court's decision on

this issue as implicitly discounting the accuracy of Richard Altimus's recollection of events in which he thought the Azores property was mentioned during his private meeting with Maria on April 13, 2015. In other words, Ricardo's e-mail apparently had an actual impact of causing the particular real property to be included in the 2015 trust of which Ricardo was himself the beneficiary. When the trial court determined that Ricardo was actively "making sure" the Azores property would be placed in the trust, it is reasonable to assume from all the findings noted above that the court understood that Ricardo was likely successful in that endeavor. In any event, we conclude that Ricardo's involvement concerning the contents of the 2015 trust, as especially evidenced and confirmed by Ricardo's e-mail with respect to the Azores property, was sufficient to tilt the scales in favor of a finding that he actively participated in the preparation of the 2015 trust.

Because the active participation element was supported by substantial evidence, and since the trial court's findings on the other two elements were not challenged on appeal, it follows that the trial court did not err in holding the common law presumption of undue influence was applicable. As noted, the presumption is rebuttable and shifts the burden of proof to the proponents of the testamentary instrument (here appellants) to show that it was not procured by undue influence. (*Estate of Sarabia*, *supra*, 221 Cal.App.3d at p. 605.) In light of how the presumption operates, and having concluded that it was correctly found to apply here, we believe it is proper at this point in our review to more fully consider the other corroborating facts and circumstances referred to by the trial court in its statement of decision. These surrounding circumstances, which are summarized below, tend to further buttress the ultimate result reached in the trial court via the presumption that the 2015 trust was procured by undue influence, and also provide further evidentiary support (beyond the factual elements of the presumption) for the trial court's determination that the presumption was not rebutted. In other words, although we could simply affirm the trial court's judgment without further inquiry based

on our conclusion that the presumption was applicable, we review and consider the broader or surrounding circumstances referred to by the trial court.

As corroborating facts and circumstances in support of its decision to apply the presumption, the trial court noted Ricardo's extensive and close involvement in connection with the procurement of the 2015 trust, which included placing the call to attorney Altimus, driving Maria to the law office only three days before she would be hospitalized due to severe blood loss, swiftly collecting and forwarding the real property deeds and other information to attorney Altimus, driving Maria to sign the documents when she was so weak and ill she could not get out of the car, and positioning himself beside her at the initial meeting with the attorney and at the execution of the documents. The trial court noted that because Ricardo was sitting beside Maria the entire time in the car during the execution of the documents, Maria never had an opportunity to speak privately with attorney Altimus about the contents of the completed documents. Moreover, the trial court emphasized that all of the foregoing extensive activity on Ricardo's part in relation to the 2015 trust was carried out by him in complete secrecy from all other family members, in great haste, and all was done when Maria was very ill and weak. Such findings were clearly supported by substantial evidence in the record and provide further support for the ultimate result reached by the trial court.[3]

Additionally, the trial court found it significant that one of the balance sheets provided by Ricardo to the attorney contained a stated goal of having $34 million by 2044. The trial court stated: "[T]his document reflects the fact that Ricardo thought of his mother's assets as his own assets and that he intended to use these assets to create a

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3 Although not raised by respondents, the above described circumstances of Ricardo's pervasive and determined involvement to gain the execution of the trust may arguably *also* show Ricardo's active participation in the procurement of the trust's *execution*, which is an alternative basis for the active participation element. (See *Rice v. Clark*, *supra*, 28 Cal.4th at pp. 96–97; *Estate of Lingenfelter* (1952) 38 Cal.2d 571, 585; *Estate of Graves* (1927) 202 Cal. 258, 262–263.)

fortune for himself to the exclusion of his siblings." In contrast to Ricardo's "goal" which assumed Maria's assets would be his own, the trial court noted elsewhere in its statement of decision that only four months before the 2015 trust was made, Maria had a draft living trust prepared by attorney Hogue that would have distributed her estate in a manner that was fairly equal among her four children. Further, Maria had consistently verbally expressed her intent to leave sizable assets to each of her four children. The 2012 will left the proceeds of the Riverdale dairy to all her four children. The trial court also noted Manuel's testimony that Maria told him multiple times that Ricardo believed he was going to "get everything" but that he would not. Again, these findings were supported by substantial evidence in the record and further buttress the ultimate result reached by the trial court.

Finally, in the course of analyzing the active participation element—and as support for its holding that the presumption of undue influence was applicable in this case—the trial court accorded considerable weight to its assessment that Ricardo's testimony at trial was in direct conflict with his prior deposition testimony and in other respects was clearly evasive and untruthful. The trial court apparently found the extent of Ricardo's contradictory or false testimony to be serious, glaring and significant. The following excerpt from the trial court's statement of decision is indicative of the court's evaluation of the nature of Ricardo's testimony at trial:

> "[T]he most compelling fact to support a finding of active procurement was the trial testimony of Ricardo. Ricardo testified inconsistently about his participation in the preparation of the 2015 Trust and Will. His deposition testimony was that he was not present when the attorney initially reviewed the terms of the Will and Trust with his mother. Respondent changed this testimony at trial and admitted he was present, but Ricardo still claimed not to have paid attention to the discussion with Mr. Altimus and claimed not [to] have known of the proposed disposition of the estate until his mother told him of the proposed terms during the drive back to Easton from Mr. Altimus's office. Ricardo also contradicted his deposition testimony regarding the signing of the 2015 Trust and Will. At his deposition, Ricardo testified that he wheeled his mother into Mr. Altimus's office and then

stayed in the reception area during the signing. At trial, Ricardo stated that Mr. Altimus's trial testimony refreshed his recollection that the Will and Trust were signed by his mother in his presence while they were all in the car in the parking lot. During Ricardo's deposition testimony, he stated the attorney did not review the terms of the documents with his mother in his presence, but during trial, Ricardo admitted that his deposition testimony was all a 'mistake.'

"Ricardo also gave inconsistent testimony about the creation of the balance sheet. During his deposition, Ricardo testified his mother asked him to prepare the balance sheet after the first appointment with Mr. Altimus on April 13, 2015. However at trial, Ricardo admitted this was incorrect. Ricardo's trial testimony was that his mother had asked him to prepare the balance sheet before the April 13 meeting. The balance sheet itself was dated March 19, 2015, weeks before the April 2015 telephone call to Mr. Altimus's office and at a time when his mother was still in the hospital. At all times during the procurement of the 2015 Will and Trust, Ricardo was acutely aware of his mother's assets and the worth of those assets.

"The Court finds that Ricardo's testimony was contradictory, evasive and ultimately not persuasive in convincing this Court that he did not actively participate in the procurement of a will and trust which would set him on the path of becoming a multimillionaire by 2044. The Court finds that Ricardo procured the deeds requested by counsel, drove his mother down and back to Hanford from Easton twice to make sure the Trust was finalized and was physically present throughout the discussion of the terms of the Trust. To suggest that Ricardo was not paying attention during these events is beyond absurd. Ricardo possesses a degree in business from Fresno State and has a real estate license. His contention that he knew nothing about the terms of the 2015 Trust and Will until after his mother's death is simply not believable.

"Ricardo's false testimony in court under oath supports the Court's finding that Ricardo also falsely claimed not to have pressured his mother into leaving the bulk of her estate to him. If Ricardo was merely being helpful and took all of these active procurement activities at his mother's direction, then why lie about his lack of knowledge of the terms of the Trust in court under oath? Why present conflicting testimony as to when the list of assets was prepared …? Why lie so blatantly during the deposition (that he wheeled his mother into attorney Altimus's office to sign the Trust documents while he stayed in the waiting room) then recant during trial, and admit that he was sitting in the driver's seat of the car during the entire 45 minutes to an hour signing process? Why, after admitting he was present for the entire signing process, did he claim not to have paid attention to the discussion of the contents of the document? The Court finds that Ricardo was 'in the driver's seat' regarding the procurement of the 2015 Trust, and that but

for Ricardo's active involvement in the preparation and signing of the 2015 Trust, it would not exist."

Based on the above excerpt, it is clear the trial court did not believe Ricardo's testimony concerning the extent of his involvement in connection with the 2015 trust. However, while the trial court was within its prerogative to disbelieve Ricardo's testimony, we note that such disbelief does not by itself create affirmative evidence to the contrary. (*Estate of Bould*, *supra*, 135 Cal.App.2d at p. 264.) Thus, while the trial court may reject all or portions of Ricardo's testimony, that rejection would not affirmatively establish a necessary factual element such as Ricardo's active participation in the actual preparation of the 2015 trust. (*Estate of Ausseresses*, *supra*, 178 Cal.App.2d 487, 490–491.) Although the trial court's statement of decision apparently relied on Ricardo's untruthful or evasive testimony as affirmative evidence that he must have actively participated in procuring the 2015 trust, we do not do so in the present opinion. Rather, we have held that *other* evidence—in particular, the e-mail concerning the Azores property—affirmatively established that element of the presumption. That being the case, we believe that Ricardo's untruthful or evasive testimony serves a secondary purpose of tending to confirm, together with all the other facts and circumstances, the propriety and equity of the ultimate disposition in this case, as well as to further substantiate the trial court's decision that appellants failed to rebut the presumption.

We note that on the final page of its lengthy opening brief, in a few cursory sentences, appellants purport to make a second argument that the trial court erred. The first argument—namely, that there was no substantial evidence to support the active participation element of the common law presumption—has failed, as explained above. The second argument presented in the manner noted above was that "even if" the trial court correctly found Ricardo actively participated in the preparation of the 2015 trust, the evidence in the record "establishes that the presumption of undue influence was rebutted." We agree with respondents that this cursory second argument is inadequately

raised and is therefore waived or forfeited. (*Cahill v. San Diego Gas & Electric Co*. (2011) 194 Cal.App.4th 939, 956 [issue in appellate brief must be supported by reasoned argument and citations to authority or else it is waived]; *Nelson v. Avondale Homeowners Assn.* (2009) 172 Cal.App.4th 857, 862; *People v. Harper* (2000) 82 Cal.App.4th 1413, 1419, fn. 4 [an argument raised in a perfunctory fashion is waived]; *Tilbury Constructors, Inc. v. State Comp. Ins. Fund* (2006) 137 Cal.App.4th 466, 482 [argument raised in perfunctory manner, without adequate legal discussion, is forfeited].)

In any event, even if the argument were not forfeited, appellants' argument would not prevail. In light of the entire evidentiary record, much of which has been summarized in this opinion, appellants have failed to demonstrate the trial court erred or that the presumption was rebutted as a matter of law. Instead, the trial court could properly conclude, as it did here, that the presumption was not rebutted.

In conclusion, we hold that the trial court correctly concluded that the common law presumption of undue influence was applicable in this case. Contrary to appellants' arguments on appeal, there was substantial evidence in the record to support the element of active participation in the actual preparation of the 2015 trust.

DISPOSITION

The judgment of the trial court is affirmed. Each party shall bear their own costs on appeal.

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LEVY, Acting P.J.

WE CONCUR:

_____
MEEHAN, J.

_____
SNAUFFER, J.